

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROCIO PENA

Claimant

VS.

EXCEL CORPORATION

Respondent,
Self-Insured

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Docket No. 256,415

ORDER

Claimant appealed the July 18, 2002 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on January 22, 2003.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for claimant. D. Shane Bangerter of Dodge City, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Decision.

ISSUES

This is a claim for a series of injuries to both of claimant's arms and shoulders. The parties stipulated the appropriate date of accident for this repetitive trauma claim was June 12, 2000. The parties also stipulated that claimant's accidental injuries arose out of and in the course of employment with respondent.

In the July 18, 2002 Decision, Judge Fuller determined claimant sustained a 4.5 percent whole person functional impairment as a result of the June 12, 2000 accident. Consequently, the Judge awarded claimant a 4.5 percent permanent partial general disability.

Claimant contends the Judge erred. Claimant argues Dr. Pedro A. Murati provided the only credible opinion regarding claimant's present and preexisting functional

impairments. Accordingly, claimant requests the Board to modify the July 18, 2002 Decision and to award her a 12 percent permanent partial general disability, which is supported by Dr. Murati's opinion that claimant has sustained an additional 12 percent whole person functional impairment due to the June 12, 2000 accident.

Conversely, respondent argues claimant's June 12, 2000 accident caused an additional 2.5 percent functional impairment to the right upper extremity and a two percent functional impairment to the left upper extremity, which combine for a 4.5 percent whole person functional impairment, as determined by the Judge. Accordingly, respondent requests the Board to affirm the Decision.

The only issue before the Board on this appeal is the extent that claimant's functional impairment increased as a result of the June 12, 2000 accident.

FINDINGS OF FACT

After reviewing the entire record, the Board finds, as follows:

I. Additional upper extremity symptoms from the June 12, 2000 accident.

At the time of the regular hearing, claimant had worked for respondent for almost 14 years. Claimant alleges that by June 2000 she had sustained repetitive trauma injuries to both arms and shoulders.

As indicated above, the parties agreed claimant sustained personal injury by accident arising out of and in the course of employment with the respondent. The parties also agreed the appropriate date of accident for this repetitive trauma claim was June 12, 2000.

Claimant did not provide a detailed history of her symptoms in her testimony. But according to the medical histories taken by the doctors who testified in this claim, claimant first sustained a work-related injury while working for respondent in 1994, when she injured her low back and right upper extremity.

Despite the 1994 accident, claimant continued to work for respondent. But several months before June 2000, claimant began having difficulty with both shoulders, the right worse than the left. At the time, claimant was performing hook and knife work that required extensive repetitive activity involving the upper extremities. Claimant reported her symptoms and respondent referred her to a physician. During this period of time, claimant also experienced increasing symptoms in her elbows and she developed a cyst on the back of her right wrist.

The doctor treated claimant with physical therapy and medications but that treatment provided no relief. Claimant also received a cortisone injection in the right elbow but that did not help. When the doctor recommended injections into the shoulders, claimant declined because of her experience with the elbow injection. In March 2001, claimant had surgery to remove the right wrist cyst.

While undergoing medical treatment, claimant continued to work, performing her regular job duties. But following the cyst removal, respondent assigned claimant to the laundry where she performed light-duty work. After two weeks in the laundry, respondent returned claimant to her regular job. But when claimant's regular job duties caused her increased symptoms, in May 2001 respondent assigned claimant to a different job making boxes.

In June 2001, claimant saw Dr. Pedro A. Murati for an evaluation. At that time, claimant was complaining of bilateral shoulder pain, bilateral arm pain and right wrist pain with numbness. In January 2002, claimant saw Dr. Paul S. Stein. At that time, claimant was complaining of significant pain on the back of the right wrist and numbness in the second and third fingers of the right hand. Claimant also complained of pain in both shoulders and elbows, the right worse than the left. Dr. Stein noted that claimant's bilateral shoulder pain appeared to be her worst problem.

II. The January 12, 1996 Agreed Award for the 1994 accident.

As indicated above, claimant sustained a work-related accident in 1994. The medical histories contained in the medical evaluation reports prepared by both Dr. Stein and Dr. Murati indicate that claimant injured both her low back and right shoulder in the accident. But the January 12, 1996 Agreed Award, which the parties stipulated into evidence, indicates claimant injured her right wrist and arm, her back and right hip in the 1994 accident. The right shoulder is not mentioned in the body of the Agreed Award.

In the first paragraph of the stipulations section of the Agreed Award, the parties acknowledged:

1. The Respondent, a self-insured, admits that the Claimant suffered personal injuries by accident arising out of and in the course of her employment, affecting her right wrist and arm, her back and her right hip occurring on May 14, 1994.

In the seventh paragraph of the stipulations, the parties agreed that claimant sustained a 10.5 percent whole person functional impairment. That paragraph reads:

7. The parties stipulate that the Claimant suffers from a 10.5 percent permanent partial impairment to the body as a whole. This amount takes into account both

functional and work disability and is based upon the medical opinions of Dr. Ernest Schlachter and Dr. C. Reiff Brown, copies of which reports are attached.

In the claim now before the Board, the parties stipulated into evidence Dr. Ernest R. Schlachter's August 22, 1995 medical report and Dr. C. Reiff Brown's March 1, 1995 medical report, both of which were referenced in, and attached to, the Agreed Award.

As stated in his August 22, 1995 report, Dr. Schlachter determined claimant sustained a 13 percent whole person functional impairment, which was broken down into a five percent whole person functional impairment due to impingement syndrome in the right shoulder, a five percent whole person functional impairment for chronic lumbosacral sprain, and a five percent functional impairment to the right upper extremity that converted to a three percent functional impairment to the whole person. The report does not indicate whether Dr. Schlachter's ratings complied with any version of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides). The doctor wrote, in part:

It is my opinion she [claimant] has a 5% permanent partial impairment of function to the body as a whole due to hr [sic] right shoulder. She has a 5% permanent partial impairment of function to the right upper extremity, which converts to a 3% permanent partial impairment of function to the body as a whole. She has a 5% permanent partial impairment of function to the body as a whole due to her lumbar spine. This combines to a 13% permanent partial impairment of function to the body as a whole.

On the other hand, Dr. Brown's March 1, 1995 report indicates that he rated claimant as having a five percent impairment to the right upper extremity, which was based upon the diagnoses of mild residuals of carpal tunnel syndrome, mild medial humeral epicondylitis and mild biceps tendon and rotator cuff tendonitis. In addition, Dr. Brown determined claimant had a chronic lumbar sprain superimposed upon a degenerating lumbosacral disc that he rated as comprising a five percent whole person functional impairment. Combining the right upper extremity impairment with the impairment from the low back, the doctor determined claimant had an eight percent whole person functional impairment. Dr. Brown's report indicates that he used the AMA Guides in determining claimant's permanent impairment, but the report does not indicate which edition of the Guides was used. The doctor wrote, in part:

In my opinion, this patient has very mild residuals of a carpal tunnel syndrome, evidence of a mild medial humeral epicondylitis and a mild biceps tendon and rotator cuff tendonitis. . . . In my opinion, these residuals amount to a 5% permanent partial impairment of function of the right arm. In addition, in my opinion, she has a chronic lumbar sprain possibly superimposed on a very early degenerating disc at L4-5. . . . The Guides to the Evaluation of Permanent

Impairment would allow an additional 5% impairment of function of the body as a whole on the basis of the degenerating lumbosacral disc and would combine with the 5% right arm impairment for a total 8% whole body impairment.

III. The medical opinions from Dr. Pedro A. Murati and Dr. Paul S. Stein.

At her attorney's request, Dr. Murati examined claimant in June 2001. As indicated in his report dated June 26, 2001, Dr. Murati initially diagnosed claimant with right carpal tunnel syndrome, right wrist pain status post ganglionectomy, and myofascial pain syndrome affecting both shoulders. Using the *AMA Guides* (4th ed.), the doctor initially rated claimant as having a 10 percent right upper extremity impairment for right carpal tunnel syndrome (six percent to the whole person) and a six percent left upper extremity impairment (four percent to the whole person) for loss of range of motion in the left shoulder, all of which combine for a 10 percent whole person impairment.

But when claimant's attorney asked Dr. Murati to review his findings and the functional impairment opinion, the doctor modified his rating. In a January 22, 2002 letter to claimant's attorney, the doctor added ratings for crepitus that he found in claimant's left wrist and for the loss of range of motion in the right shoulder. Dr. Murati wrote that claimant had a six percent functional impairment to the left upper extremity (four percent whole person functional impairment) for the wrist crepitus and a two percent right upper extremity impairment (one percent whole person functional impairment) for the right shoulder. The doctor combined those ratings and determined claimant had an additional five percent whole person functional impairment under the *AMA Guides* (4th ed.).

Moreover, at his May 2002 deposition, Dr. Murati combined the 10 percent whole person functional impairment identified in his June 26, 2001 report with the five percent whole person functional impairment identified in the January 22, 2002 letter and testified that claimant presently had a 15 percent whole person functional impairment.

Coincidentally, Dr. Murati had treated claimant in December 1994 for right carpal tunnel syndrome. In December 1994, Dr. Murati rated claimant as having a 10 percent functional impairment to the right upper extremity due to both median and ulnar nerve entrapment according to the *AMA Guides* (3d ed. rev.).

In short, Dr. Murati indicated claimant would have a 12 percent whole person functional impairment attributable to the June 2000 accident assuming claimant had a five percent functional impairment to the right upper extremity for the median nerve entrapment, or right carpal tunnel syndrome, from the earlier injury.

At Judge Fuller's request, Dr. Stein examined claimant in January 2002 and rated claimant's permanent functional impairment under the *AMA Guides* (4th ed.). Dr. Stein

rated claimant's present functional impairment to the right upper extremity at 14 percent, which is comprised of 10 percent for the right carpal tunnel syndrome and four percent for loss of range of motion in the shoulder. Converting the right upper extremity rating to the whole person, the doctor concluded claimant had sustained an eight percent whole person functional impairment. The doctor also found loss of range of motion in claimant's left shoulder, which created a three percent functional impairment to the left upper extremity, or two percent whole person functional impairment.

Assuming claimant had a 5.5 percent whole person functional impairment for the right upper extremity before the June 2000 accident, Dr. Stein indicated that the June 2000 accident would have caused an additional 2.5 percent whole person functional impairment. The doctor testified, in part:

Q. (Mr. Bangerter) Doctor, assume with me that in a prior case, which I've marked as Deposition Exhibit No. 3, that we stipulated and agreed that claimant suffered from a 5.5 percent right upper extremity *[sic]* impairment. If we were to subtract the 5.5 percent prior impairment from the 8 percent that you just testified to, what percent impairment then remains?

A. (Dr. Stein) 2 and a half percent.

Q. Then, Doctor, it appears that you assigned a 3 percent left upper extremity impairment; is that correct?

A. Yes.

Q. And if we combined *[sic]* that extremity impairment to the body as a whole, Doctor, what does that convert to?

A. 2 percent.

Q. So then if we would combine the 2 and a half percent to the right upper extremity with the 2 percent body rating, what do those two percentages combine to?

A. That would be 4 and a half percent to the body as a whole.¹

¹ Stein Depo. at 5-6.

IV. Claimant's present functional impairment.

Only Dr. Murati and Dr. Stein provided an opinion of claimant's present functional impairment. According to Dr. Murati, claimant presently has a 15 percent whole person functional impairment. According to Dr. Stein, claimant now has a 10 percent whole person functional impairment for her bilateral upper extremity injuries.

The Board finds and concludes claimant's present whole person functional impairment is 10 percent. The Board finds Dr. Stein's opinion the more persuasive as he was requested by the Judge to evaluate claimant and provide an unbiased opinion.

CONCLUSIONS OF LAW

The Board concludes claimant's permanent partial general disability should be increased to 10 percent.

The Workers Compensation Act provides that a worker is entitled to receive compensation for an increase in the amount of functional impairment when a work-related accident aggravates a preexisting condition. K.S.A. 1999 Supp. 44-501(c) provides:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In *Hanson*,² the Kansas Court of Appeals held the employer had the burden to prove the amount of preexisting functional impairment to be deducted under the above-quoted statute.

The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.³

Functional impairment is defined in K.S.A. 1999 Supp. 44-510e as

² *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. ____ (2001).

³ *Id.* at Syl. ¶ 5.

the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Moreover, in *Baxter*⁴ the Kansas Supreme Court held that prior settlement agreements that set forth a worker's percentage of disability only control the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury⁵ as modern medical treatment, time and nature make it possible to reduce a disability or even completely rehabilitate a disabled worker.⁶ The same reasoning applies to a worker's functional impairment.

The Board concludes respondent failed to prove the amount of functional impairment under the AMA *Guides* (4th ed.) that preexisted claimant's June 12, 2000 accident. First, the medical records from Dr. Schlachter and Dr. Brown fail to establish what functional impairment claimant had under the AMA *Guides* (4th ed.), as required by K.S.A. 1999 Supp. 44-510e. Second, the parties stipulated in the Agreed Award that the 10.5 percent rating entailed both functional impairment and work disability. Therefore, it is not possible, without speculating, to apportion the 10.5 percent rating between functional impairment and work disability, or apportion the percentage between the different parts of the body. Third, under the principles of *Baxter*, the disability and functional impairment at the time of an earlier settlement may not reflect the true functional impairment that a worker is experiencing immediately before another accident. Fourth, the functional impairment opinion from Dr. Murati in December 1994 was not pursuant to the AMA *Guides* (4th ed.).

In short, the evidence fails to establish the extent of claimant's functional impairment immediately before she sustained the injuries that are the subject of this claim. Consequently, claimant is entitled to receive permanent partial general disability benefits for a 10 percent whole person functional impairment without any reduction for preexisting impairment.

⁴ *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 738 P.2d 445 (1987).

⁵ *Id.* at Syl. ¶ 2.

⁶ *Id.* at Syl. ¶ 1.

AWARD

WHEREFORE, the Board modifies the July 18, 2002 Decision entered by Judge Fuller and increases claimant's permanent partial general disability to 10 percent.

Rocio Pena is granted compensation from Excel Corporation for a June 12, 2000 accident and resulting disability. Based upon an average weekly wage of \$472.62, Ms. Pena is entitled to receive 41.50 weeks of permanent partial general disability benefits at \$315.10 per week, or \$13,076.65, for a 10 percent permanent partial general disability, making a total award of \$13,076.65, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Decision that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation